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SERVICE DATE - MARCH 10, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION²

No. 41650

AMERICAN FIBER-VELOPE MFG CO.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41651

CONCEPT FIXTURES, LTD.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41652

DRG MEDICAL PACKAGING CO.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41653

KIMBERLY CLARK, LTD.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41654

WESTVACO CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41655

JIM WALTERS PAPERS, INC. d/b/a MAIL WELL ENVELOPE CO.
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41656

PAPERCON CORPORATION--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in these proceedings. Unless otherwise indicated, citations are to the former sections of the statute.

² This decision embraces seven proceedings involving the same respondent and similar facts and issues.

Decided: February 26, 1997

We find that the collection of undercharges sought in these proceedings would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in these proceedings.

BACKGROUND

These matters arise out of the efforts of The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or respondent)³ to collect undercharges from American Fiber-Velope Mfg. Co. (American), Concept Fixtures, Ltd. (Concept), DRG Medical Packaging Co. (DRG), Kimberly Clark, Ltd. (Kimberly Clark), Westvaco Corporation (Westvaco), Jim Walters Papers, Inc. d/b/a Mail-Well Envelope Co. (Jim Walters), and Papercone Corporation (Papercone) (collectively petitioners). These proceedings are before the Board on referral from the United States District Court for the Eastern District of Missouri, Eastern Division, in J.H. Ware Trucking--Debtor v. American Fiber-Velope, No. 4:93CV2437SNL (TIA), J.H. Ware Trucking--Debtor v. Concept Fixtures, Ltd., No. 4:93CV2430SNL (TIA), J.H. Ware Trucking--Debtor v. DRG Medical Packaging Co., No. 4:93CV2502SNL (TIA), J.H. Ware Trucking--Debtor v. Kimberly Clark, Ltd., No. 4:93CV2477SNL (TIA), J.H. Ware Trucking--Debtor v. Westvaco Corporation, No. 4:93CV2567SNL (TIA), J.H. Ware Trucking--Debtor v. Jim Walters Papers, Inc., No. 4:93CV2480SNL (TIA), and J.H. Ware Trucking--Debtor v. Papercone Corporation, No. 4:93CV2499SNL (TIA). In the court proceedings, Ware seeks to collect undercharges as follows:

Docket Number & Shipper	Number of shipments	Dates of shipments	Undercharges
No. 41650, American	52	Between 9/1/88 and 7/1/91	\$ 5,203.57, plus interest
No. 41651, Concept	3	Between 3/12/90 and 11/6/90	\$ 3,763.54, plus interest
No. 41652, DRG	13	Between 10/18/89 and 7/12/91	\$ 8,872.08, plus interest
No. 41653, Kimberly Clark	37	Between 9/1/89 and 7/12/91	\$13,335.96, plus interest

³ On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 14, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

No. 41654, Westvaco	25	Between 12/4/90 and 7/10/91	\$ 4,449.43, plus interest
No. 41655, Jim Walters	15	Between 6/30/88 and 6/13/91	\$ 4,654.63, plus interest
No. 41656, Papercone	7	Between 4/19/89 and 4/17/91	\$ 2,026.43, plus interest

By orders dated September 18, 1995, the court stayed the proceedings and directed petitioners to submit issues of contract carriage and rate reasonableness to the ICC for determination.

Pursuant to the court orders, petitions were filed on November 6, 1995, in each of the proceedings, requesting the ICC to resolve issues of contract carriage, tariff applicability, rate reasonableness, and unreasonable practice. Ware filed answers on November 29, 1995. By decisions served November 13, 1995, in Nos. 41650, 41651, and 41652; November 14, 1995, in Nos. 41653, 41654, and 41655; and November 17, 1995, in No. 41656, the ICC established procedural schedules for the submission of evidence on non-rate reasonableness issues. Petitioners filed their opening statements on March 15, 1996. Ware did not reply.

Petitioners assert that the shipments that are the subject of these proceedings were transported by Ware pursuant to duly executed contractual agreements between Ware and A T Services, Inc. (ATSI), a third party broker.⁴ They contend that ATSI, as an independent contractor, entered into the agreements with Ware and arranged for Ware to provide transportation services for ATSI's shipper customers. Petitioners state that ATSI paid Ware for the transportation services rendered in accordance with the terms of the contracts.

Attached to each petitioner's opening statement is an affidavit of Letitia G. St. John, vice president of ATSI. Ms. St. John asserts that ATSI holds itself out as an independent contractor in arranging transportation by motor carrier for its shipper/consignee customers. In that capacity, ATSI undertook negotiations with Ware to arrange for contract carrier transportation services under Ware's contract carrier authority. Ms. St. John states that the negotiations resulted in agreements dated January 28, 1988, March 9, 1989, and May 6, 1991, under which Ware would provide transportation services for ATSI and its customers, with freight charges to be set in accordance with the terms of the agreements. Copies of the agreements are attached to the affidavits (Exhibits B, C, and D).⁵ Ms. St. John further

⁴ Board records show that Broker License No. MC-200927 was issued to "Associated Transerv, Inc." on July 15, 1987. On March 31, 1989, the name of the broker was changed to "A T Services, Inc."

⁵ Among the terms set forth in the agreements are the following: (1) Ware is to provide contract carrier services for ATSI; (2) Ware is to assume liability for shipments from time of receipt until proper delivery is made; (3) ATSI is to pay Ware
(continued...)

states that, under the agreements, Ware was to issue bills of lading indicating that ATSI was the party that arranged for the subject transportation service; submit its freight bills to ATSI for payment within 30 days of receipt; and authorize ATSI to receive payment from its shipper clients on Ware's behalf with the express understanding that payment to ATSI would relieve ATSI's client shippers from liability to Ware. Ms. St. John asserts that Ware submitted its invoices to ATSI and that the invoices were paid by ATSI in conformity with the terms of the agreements.

DISCUSSION

We dispose of these proceedings under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we recognize that the court referred issues such as rate reasonableness and common/contract carriage for our consideration, and that petitioners in their defense focused primarily on the common/contract carriage issue. Nevertheless, the Board's use of section 2(e)'s "unreasonable practice" provisions to resolve these matters is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, it may choose to decide cases on other grounds within its jurisdiction, Gantrade Corp.--Pet. for Decl. Order--Ritter Transp., Inc., No. 40515 (ICC served May 8, 1995).

With the question of NRA's applicability now beyond doubt, the Board has acted to use section 2(e) to more readily dispose of undercharge cases on its docket, even in those cases where, as here, the primary regulatory defense raised by the shipper against the undercharge claim has been contract carriage. E.g., Chiquita Brands, Inc.--Pet. for Decl. Order--Olympic Express, Inc., No. 41032 (STB served Oct. 22, 1996) and Southware Company et al.--Pet. for Decl. Order--Jones Truck Lines, Inc., No. 41543 (STB served Aug. 7, 1996). As illustrated by these cases, infra, that has occurred because, in most instances, a contract establishes "written evidence" that the parties intended a negotiated, unfiled rate to supplant the filed tariff rate that a nonoperating carrier such as Ware now retroactively seeks to enforce, and for which the NRA, through section 2(e), provides a complete defense. Thus, while the petitioners relied principally on a contract carriage defense, our use of section 2(e), rather than a common/contract determination, to resolve these proceedings is fully consistent with our present approach in all of the court-referred undercharge cases on our docket.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the

(...continued)

for services performed under rates and charges that may be established and agreed upon at the time ATSI delivers the freight to Ware; (4) ATSI is to handle all billing and pay Ware within 30 days of receipt of invoice and delivery receipt; (5) payments made to ATSI by ATSI's customer/assignees shall relieve those customer/assignees from liability to Ware; and (6) ATSI is to tender Ware a minimum of 12 loads yearly.

jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."⁶

Here, it is undisputed that Ware is no longer an operating carrier.⁷ Thus, we may proceed to determine whether Ware's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

We must first address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains motor transportation contracts between Ware and ATSI. Some of the provisions of these contracts indicate that ATSI is acting in the capacity of an independent contractor, with ATSI shipper/consignee customers standing in the position of third-party beneficiaries to the agreements. Regardless of whether Ware's services to ATSI were held out under its contract carrier authority--which they may well have been--these documents confirm the existence of a negotiated rate agreement between Ware and ATSI and satisfy the written evidence requirements of section 2(e). E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994).

In exercising our jurisdiction under 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

⁶ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments in these proceedings, including those shipments that were transported after September 30, 1990.

⁷ Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

The evidence establishes that ATSI, acting on behalf of its customers American, Concept, DRG, Kimberly Clark, Westvaco, Jim Walters, and Papercone,⁸ was offered negotiated rates by Ware. ATSI tendered traffic on behalf of its customers to Ware in reasonable reliance on the offered rates. Ware billed and collected the negotiated rates. Now, Ware is seeking to collect additional payments from petitioners, customers of ATSI, based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Ware to attempt to collect undercharges from petitioners for the shipments at issue in these proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. These proceedings are discontinued.
2. This decision is effective on March 10, 1997.
3. A copy of this decision will be mailed to:

The Honorable Stephen N. Limbaugh
United States District Court for the
Eastern District of Missouri,
Eastern Division
U.S. Court & Custom House
1114 Market Street, Room 315
St. Louis, MO 63101

Nos. 4:93CV2437SNL (TIA), 4:93CV2430SNL (TIA)
4:93CV2502SNL (TIA), 4:93CV2477SNL (TIA),
4:93CV2567SNL (TIA), 4:93CV2480SNL (TIA),
and 4:93CV2499SNL (TIA)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁸ Based on the facts of record in these proceedings, ATSI can also be recognized as an independent contractor in its dealings with Ware.